

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JULIETA LOPEZ</b>	)	
Claimant	)	
VS.	)	
	)	
<b>THE CAPPER FOUNDATION</b>	)	Docket No. 220,869
Respondent	)	
AND	)	
	)	
<b>COMMERCIAL UNION INSURANCE COMPANIES</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals from the December 29, 1998, Award of Administrative Law Judge Brad E. Avery. The Administrative Law Judge found claimant suffered personal injury by accident through a series of accidents culminating on May 29, 1996, and, as a result, is permanently and totally disabled. Oral argument was held on August 4, 1999.

**APPEARANCES**

Claimant appeared by her attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Kip A. Kubin of Overland Park, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

**ISSUES**

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Has claimant shown a good faith effort, post injury, to obtain employment?

- (3) What is the appropriate rate at which temporary total disability compensation should be paid?
- (4) In the award computations, can temporary total disability compensation and permanent disability compensation be paid during the same time period?
- (5) Is claimant entitled to interest and penalties under K.S.A. 44-512b? Whether claimant suffered accidental injury arising out of and in the course of her employment with respondent was an issue raised before the Administrative Law Judge. However, the parties did not raise this issue to the Board.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file herein, the Appeals Board finds as follows:

Claimant worked for respondent on more than one occasion. The most recent employment relationship began in 1982 when claimant was hired as a physical therapist aide. Sometime later, claimant transferred to occupational therapy and, on the date of accident, was an occupational therapist aide. Claimant worked from 1982 through May 28, 1996. Claimant has not worked anywhere since then.

Prior to May 1996, claimant had experienced some back pain. Between May of 1994 and May of 1996, claimant was seen by John Chance, D.C., a chiropractor. Claimant sought no medical care, other than chiropractic, during the two years before May 29, 1996.

In March 1996, claimant traveled to Breckenridge, Colorado, as part of her job. Claimant's responsibilities included taking care of a 16-year-old, handicapped child. While in Colorado, claimant was pushing the child on a sled outside in the snow when she suffered injury to her low back. She advised Nan Atwood, her supervisor, that she did not want to continue pushing the patient through the snow because she was injured.

Claimant returned to Topeka, Kansas, and continued her employment with respondent after the March 1996 incident. However, claimant's back worsened, and she began developing sharp pains in her left leg. On May 28, 1996, claimant went to work, planning on working all day, but was unable to work more than one hour. Claimant advised Mary Ann Keating, the head of therapy, that she was in pain and was leaving. Claimant did not advise Ms. Keating that the pain was work-related. Claimant did, however, leave a note for Sandy Warren, the financial officer, advising her that her injury was work-related.

and she was seeing a doctor due to her increased pain. Claimant's supervisor, Gail Bill, was not present on that date.

Claimant first went to Mahendra N. Patel, M.D., for a CT scan on May 28, 1996. On June 3, 1996, claimant had an EMG performed by Joseph G. Sankoorikal, M.D. Claimant's treatment was followed up with epidural injections administered by Dr. Patel and an MRI and CT scan with contrast. The test results indicated degenerative changes associated with severe disc degeneration at L5-S1, and facet hypertrophy at that level on the left side. The MRI also indicated asymmetric bulging of the disc towards the left side at the L5-S1 level. Claimant underwent a left hemilaminectomy at L5-S1 with medial facetectomy and foraminotomy on September 12, 1996, under the hand of neurosurgeon K. N. Arjunan, M.D. Unfortunately, claimant had a poor result from her surgery and was unable to return to her employment with respondent.

Claimant was examined by Joseph W. Huston, M.D., an orthopedic surgeon, in Topeka, Kansas, on October 7, 1997, at the request of respondent and its insurance carrier. He assessed claimant a 22 percent whole body impairment, finding that, as of the time of his examination, claimant had significant limitations and restrictions. Dr. Huston went on to state that he did not think claimant "is able to be employed."

When asked to explain that comment during his deposition, Dr. Huston stated that he did not feel claimant was able to be employed at Capper Foundation. He was not eliminating all opportunities for employment; just those that claimant had performed at respondent's employment for the last 14 years. He found claimant unable to stand or walk "over a little bit" and opined that "[s]he is not able to bend and twist or lifting anything over just a very few pounds."

Claimant was examined by Daniel D. Zimmerman, M.D., on January 30, 1998, at the request of her attorney. Dr. Zimmerman noted substantial abnormal findings on physical examination and opined that claimant had a poor result from her surgery. He assessed claimant a 26 percent impairment to the body as a whole, adding 2 percent to his original 24 percent rating because of claimant's pain. This was pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). Dr. Zimmerman was provided a task list prepared by Bud Langston. In reviewing the task list, Dr. Zimmerman felt claimant incapable of performing any of the tasks that claimant had performed during the previous 15 years. Dr. Zimmerman noted that he did not believe that claimant was employable. He agreed with Dr. Huston's comments that claimant could not stand or walk "over a little bit" and was not able to lift "anything over just a very few pounds." He did note that claimant had had low back problems as early as 1992, but felt the 1996 incident was certainly a contributing factor to her difficulties.

Claimant was referred to Vito J. Carabetta, M.D., a physical medicine and rehabilitation specialist, board certified, in Olathe, Kansas. Dr. Carabetta examined

claimant on May 18, 1998, as an independent examining physician with a referral from the Administrative Law Judge. He assessed claimant a 23 percent whole person impairment. He was also provided the task list prepared by Mr. Langston. Dr. Carabetta felt claimant capable of performing task number 12 which involved claimant's driving children to and from school. He opined claimant was no longer capable of performing the remaining eleven tasks.

Claimant acknowledged that, since leaving employment with respondent, she has not sought employment and is currently on Social Security disability. In September 1998, respondent offered claimant vocational rehabilitation assistance in her attempts to seek additional employment. This offer was declined by claimant at regular hearing and in a letter dated September 25, 1998, which alleged that claimant was unable to work at any occupation. The Administrative Law Judge in the Award found claimant permanently and totally disabled.

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which this right depends by preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g).

Dr. Zimmerman found claimant to have suffered a very poor result from her low back surgery. He confirmed that claimant was 100 percent disabled from performing any job tasks and, in his opinion, was realistically unemployable. His opinion that claimant was significantly restricted in her ability to stand and walk and not able to lift anything over a few pounds echoed the sentiments of orthopedic surgeon Joseph W. Huston, M.D. Dr. Carabetta, the independent medical examining doctor, found that claimant was capable of performing only one task out of twelve, that being driving students to and from activities. In considering the claimant's testimony that she is not capable of sitting more than 10 or 15 minutes at a time without moving around, the Appeals Board does not find this opinion by Dr. Carabetta to be credible. Even Dr. Huston felt claimant unable to perform any of the jobs that she had performed with respondent. The Appeals Board finds, as did the Administrative Law Judge, that claimant is permanently and totally disabled as a result of a series of injuries through May 28, 1996. See Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

In workers' compensation litigation, the Appeals Board must normally decide whether a claimant has made a good faith effort to obtain post-injury employment. Note Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). However, in this instance, as the Appeals Board has already found claimant permanently and totally disabled, claimant's good faith, post-injury, job search efforts are moot.

Claimant's weekly compensation rate in the Award was found to be \$257.97 per week based upon an average weekly wage of \$386.94. The Appeals Board affirms this finding.

In her brief, claimant argued she was entitled to temporary and permanent benefits during the same time period. At oral argument, respondent argued that temporary total disability compensation and permanent disability cannot be awarded during the same weeks, as they are mutually exclusive terms. Respondent cites Rose v. Thornton & Florence Electric Co., 4 Kan. App. 2d 669, 609 P.2d 1180, *rev. denied* 228 Kan. 807 (1980). The Kansas Supreme Court, in the more recent case of Crabtree v. Beech Aircraft Corp., 229 Kan. 440, 625 P.2d 453 (1981), discussed not only temporary disability and permanent disability, but also the terms "total" and "partial." In Crabtree, the Supreme Court found that "[m]aximum recovery and medical stability are key factors in determining the time demarcation between temporary disability and permanent disability." This finding shows a clear intent to differentiate between temporary and permanent disability, and to not award the two during the same time period.

The Supreme Court also stated that "'[t]otal' and 'partial' are mutually exclusive terms." Therefore, a claimant who is temporary totally disabled cannot receive benefits during the same period when a claimant is partially disabled. Under the logic of Crabtree, the Appeals Board finds that claimant, whether permanent partially or permanent totally disabled, cannot receive permanent benefits during the period of time when claimant is temporarily disabled. Therefore, claimant's request that she be paid 63 weeks temporary total disability compensation and payments of permanent disability compensation during those same weeks is denied.

Claimant requests interest and penalties under K.S.A. 44-512b which states in part:

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto.

In this case, there was a dispute regarding claimant's entitlement to benefits as respondent originally denied claimant suffered accidental injury arising out of and in the course of her employment. The records did show that claimant had preexisting problems with her back and had been receiving chiropractic care for over two years prior to the date of accident. In addition, there was a dispute between the examining doctors as to what

functional impairment claimant may have suffered and how much of this functional impairment was related to her work-related injuries with respondent. The Appeals Board finds, pursuant to K.S.A. 44-512b, that there was just cause for respondent's failure to pay benefits prior to the Award, and interest and penalties are not appropriate.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated December 29, 1998, should be, and is hereby, affirmed, and an award is granted in favor of the claimant, and against the respondent and its insurance carrier, for an accidental injury occurring on May 29, 1996, and based upon an average weekly wage of \$386.94, for a permanent and total disability. Claimant is entitled to 63 weeks temporary total disability compensation at the rate of \$257.97 per week totaling \$16,252.11, followed thereafter by compensation at the rate of \$257.97 per week, for a total award not to exceed \$125,000.

As of January 26, 2000, claimant is entitled to 63 weeks temporary total disability compensation at the rate of \$257.97 per week totaling \$16,252.11, followed thereafter by 128 weeks permanent total disability compensation at the rate of \$257.97 per week totaling \$33,020.16, for a total of \$49,272.27, which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, the remaining balance of \$75,727.73 is to be paid for 293.55 weeks at the rate of \$257.97 per week, for a total of award not to exceed \$125,000 until fully paid or further order of the Director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and its insurance carrier to be paid as follows:

Appino & Biggs Reporting Service	
Bud Langston Deposition	\$140.20
Sandy Warren Deposition	\$208.20
Joseph W. Huston Deposition	\$ 59.80
Preliminary Hearing Transcript	\$314.40
 Nora Lyon & Associates	
Regular Hearing Transcript	\$172.75
 Richard Kupper & Associates	
Vito J. Carabetta Deposition	\$179.50
 Gene Dolginoff Associates, LTD	

Daniel D. Zimmerman Deposition

\$344.05

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Topeka, KS  
Kip A. Kubin, Overland Park, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director